# WISCONSIN SUPREME COURT
# CALENDAR AND CASE SYNOPSES
# JANUARY, 2013

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol.

This calendar includes cases that originated in the following counties:

Chippewa
Columbia
Kenosha
Milwaukee
Walworth

**WEDNESDAY, JANUARY 9, 2013**

| | | | |
|---|---|---|---|
| 9:45 a.m. | 10AP425 | - | State v. Tramell E. Starks |
| 10:45 a.m. | 11AP2166 | - | David J. Rosecky v. Monica M. Schissel |
| 1:30 p.m. | 11AP788 | - | Christopher T. Beidel v. Sideline Software, Inc. |

**THURSDAY, JANUARY 10, 2013**

| | | | |
|---|---|---|---|
| 9:45 a.m. | 10AP3158 | - | Park Bank v. Roger E. Westburg |
| 10:45 a.m. | 11AP685-CR | - | State v. Lamont L. Travis |

**FRIDAY, JANUARY 11, 2013**

| | | | |
|---|---|---|---|
| 9:45 a.m. | 11AP450-CR | - | State v. Julius C. Burton |
| 10:45 a.m. | 11AP203 | - | Xcel Energy Services, Inc. v. Labor and Industry Review Comm. |

In addition to the cases listed above, the following case is assigned for decision by the court on the last date of oral argument based upon the submission of briefs without oral argument:

11AP2458-D - Office of Lawyer Regulation v. Peter J. Thompson

The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. Summaries provided are not complete analyses of the issues presented.

**WISCONSIN SUPREME COURT**
**WEDNESDAY, JANUARY 9, 2013**
**9:45 a.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Kevin E. Martens, presiding.*

2010AP425 State v. Starks

This criminal case examines pleading standards and procedures arising from a defendant's claims of ineffective assistance of both trial and post-conviction counsel.

Specifically, the Supreme Court reviews whether Tramell E. Starks's *pro se* § 974.06 motion claiming ineffective assistance of counsel is procedurally barred as a successive motion under Wis. Stat. § 974.06(4) because Starks had previously filed a *pro se* motion to modify his sentence to vacate a DNA surcharge. The Court also reviews whether Stark's allegations of ineffective assistance of counsel satisfy the "sufficient reason" requirement of § 974.06(4).

Some background: Starks was charged with first-degree intentional homicide, as party to a crime, and possession of a firearm by a felon. A jury convicted him of the possession charge and of first-degree reckless homicide, a lesser-included offense of the intentional-homicide charge. Starks was sentenced to a total of 36 years' initial confinement and 19 years' extended supervision.

Starks, through counsel, pursued and lost a direct appeal. Starks discharged his appellate counsel and filed a *pro se* motion for reconsideration with the Court of Appeals, which the court denied.

Starks then filed a *pro se* § 974.06 motion with the circuit court. The circuit court refused to accept the motion due to Starks's non-compliance with the local rules, but granted him leave to re-file the motion within the limitations of the local rules.

Starks then filed with the circuit court a *pro se* motion to vacate a DNA surcharge. The circuit court denied the motion as time-barred.

Starks then filed with the circuit court a § 974.06 motion claiming ineffective assistance of trial counsel, and ineffective assistance of post-conviction counsel for failing to raise the alleged ineffective assistance of trial counsel.

The circuit court took up Starks's § 974.06 motion on its merits. It rejected each of Starks's contentions of trial counsel ineffectiveness, and thus held that Starks's post-conviction counsel was not ineffective for failing to raise these issues.

Starks appealed. The Court of Appeals ruled that Starks's § 974.06 motion was barred by the successive motion bar under § 974.06(4) and State v. Escalona-Naranjo, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). The court ruled that Starks could have raised his ineffectiveness claims at the same time as the motion to vacate the DNA surcharge.

The Wisconsin Association of Criminal Defense Lawyers (WACDL) has filed a non-party brief amicus curiae in support of Starks' *pro se* petition for review. WACDL argues that the Court of Appeals' interpretation of § 974.06(4) is unreasonable because it conflicts with the rationale of Escalona-Naranjo and with an unpublished appellate decision, State v. Matamoros, 2011 WI App 19, 331 Wis. 2d 487, 795 N.W.2d 62 (Table), Case No. 2009AP2982, unpub. slip op. (Ct. App. 2010).

**WISCONSIN SUPREME COURT**
**WEDNESDAY, JANUARY 9, 2013**
**10:45 a.m.**

*This is a certification from the Wisconsin Court of Appeals, District IV (headquartered in Madison). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Columbia County Circuit Court, Judge Alan J. White, presiding.*

2011AP2166 Rosecky v. Schissel

This certification asks the Wisconsin Supreme Court to decide whether an agreement for a traditional surrogacy and adoption of a child is enforceable.

Some background: David and Marcia Rosecky and Monica and Cory Schissel were longtime friends. Marcia Rosecky's leukemia treatment prevented her from bearing a child. The Schissels have five children of their own. In 2004, and again in 2008, Monica offered to carry a child for the Roseckys to raise. The Roseckys decided to take Monica up on the offer.

The parties entered into an agreement for a traditional surrogacy whereby an embryo would be conceived via artificial insemination using Monica's own egg and David's sperm. (A gestational surrogacy involves implanting the surrogate with an embryo created by in vitro fertilization.)

The parties agreed, first verbally and then in writing through a written parentage agreement that Monica would carry a child for the Roseckys, who would raise the child to adulthood.

The agreement specified that after the child was born the Roseckys would have physical placement and custody and that the Schissels would not have rights to custody or placement. The agreement also provided that Monica would cooperate with any proceedings for the termination of her parental rights and adoption of the child by the Roseckys.

Before the child was born, Monica informed the Roseckys that she was unwilling to terminate her parental rights. Following the birth of the child, David filed a motion in circuit court seeking specific performance of the parentage agreement. On Feb. 8, 2011, the circuit court denied the motion for specific performance and found that the parentage agreement was null and void because it did not meet the requirements for voluntary termination of parental rights under ch. 48, Stats. The parties stipulated to an interim placement order that allowed Monica three hours of visitation with the child every other week.

A trial was held to determine the child's best interests relative to custody and physical placement under § 767.41, Stats. In a decision and order dated Aug. 25, 2011, the circuit court awarded sole custody and primary placement of the child to David. The court awarded secondary placement to Monica, under terms that allow her six hours of placement every other weekend until the child reaches two years of age (which occurred in March 2012), after which point Monica is entitled to overnight placement every other weekend.

David Rosecky appealed, arguing that the parentage agreement should be enforced. He asserts the parentage agreement can be enforced without requiring Monica to terminate her parental rights. He also points to the severability clause in the agreement which allows the court

to enforce other valid provisions of the contract and carry out the parties' intent, in the event some provisions are deemed invalid.

David also argues that the doctrine of equitable estoppel requires enforcement of the contract – that Monica made both verbal and written promises that she would serve as the Roseckys' surrogate. David argues Monica knew the Roseckys would rely on her promises and with that knowledge she became inseminated with David's sperm, became pregnant, and accepted certain payments from the Roseckys.

Monica argues that the parentage agreement cannot be enforced because it contains illegal payment provisions; its attempt to contract away parental rights is invalid; it cannot be binding on the parties without prior court approval; it impermissibly substitutes the parties' agreement for the best interest of the child; and the termination of parental rights provision is contrary to Wisconsin law. Monica points out that 31 states, including Wisconsin, have no laws either allowing or prohibiting surrogacy agreements.

In its certification memo, District IV says whether a surrogacy agreement should be enforced is a question that is likely to recur and involves policy determinations of statewide importance that are most appropriately decided by the Supreme Court.

**WISCONSIN SUPREME COURT**
**WEDNESDAY, JANUARY 9, 2013**
**1:30 p.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, William W. Brash, presiding.*

2011AP788 Beidel v. Sideline Software

This case arises from a dispute between the two shareholders of Sideline Software, Inc. (Sideline), a tightly held fantasy football software company. The Supreme Court will examine the doctrine of "constructive termination" (or "constructive discharge") in the context of a stock-repurchase agreement (agreement).

Some background: Christopher T. Beidel and Michael C. Hall incorporated Sideline in 1998. Hall was the bare-majority stockholder with 2,505 shares of Sideline stock; Beidel had 2,495 shares. In 2004, Hall and Beidel entered into the agreement, which provided that if a shareholder was fired without cause, the terminated shareholder could "put" his shares to the corporation, which would require Sideline to buy that shareholder's stock at an agreed price.

The price was periodically revised as agreed upon at times under the agreement, and the final price the two shareholders agreed upon was $1,600 per share in March 6, 2007 – a price that would remain in effect until March 6, 2009.

In the fall of 2008, a third party apparently made inquiries about buying Sideline. Beidel and Hall were not in agreement on pursuing a possible sale and could not agree on the future direction of the company.

Hall spoke with Beidel on the telephone and indicated that he planned on firing Beidel in March 2009 after the $1,600 stipulated per share purchase price had expired. At a subsequent in-person meeting, Hall again indicated that he intended to terminate Beidel's employment after the expiration of the stipulated per share price and asked Beidel to explain in writing what he had been doing for the company so his duties could transitioned to others.

On Jan. 20, 2009, Beidel sent a letter to Hall that purported to exercise Beidel's "put" option for Sideline to purchase his shares at the stipulated $1,600 per share price. Beidel's letter stated that it did not constitute a voluntary termination of his employment. He asserted that Hall had already effectively terminated his employment by informing Beidel that he would be terminated and by transitioning Beidel's dueties to other Sideline employees.

Beidel filed a complaint against Sideline, Hall and Kevin Austin, another officer of Sideline. Consistent with the language of the agreement, Beidel's complaint sought specific performance by Sideline of its obligation to purchase the shares that Beidel had "put" to the corporation in his letter.

Sideline filed a motion for summary judgment. The circuit court granted summary judgment to Sideline on any claim for "constructive discharge," concluding that Beidel's claim rested on a theory of constructive termination, which deems an employee to have been fired even when the employer does not affirmatively terminate the employee's employment. The circuit court noted, however, that a claim for constructive termination does not lie unless the employee has resigned as a result of what the employer has done. *See* Strozinsky v. School Dist. of Brown Deer, 2000 WI 97, ¶83, 237 Wis. 2d 19, 614 N.W.2d 443. Because Beidel had never resigned,

the circuit court concluded that he could not pursue a claim that was based on the doctrine of constructive termination.

The Court of Appeals reversed and remanded to the circuit court for a weighing of the equities regarding the issue of specific performance. The Court of Appeals agreed with the circuit court that Beidel could not rest his claim on a theory of constructive termination because he had never resigned. It nonetheless determined that, given Beidel's request for specific performance of the agreement and the rule that all contracts have an implied duty of good faith and fair dealing, the circuit court should have weighed the equities regarding whether Beidel's employment had been terminated before the expiration of the stipulated purchase price such that he could require the company to buy his shares at that price.

Sideline asks the Supreme Court to review if Beidel had been terminated within the meaning of the agreement prior to the expiration of the stipulated per share purchase price, if Beidel was required to prove a constructive termination under the essential elements set out in Strozinsky in order to put his shares to Sideline for the stipulated price.
Additionally, Sideline asks the Supreme Court to review: if the implied covenant of good faith and fair dealing require a court to "assess competing equities" between the parties in making a determination whether an unambiguous provision of a contract has been breached; and when a breach of contract lawsuit has been pled as an equitable action for specific performance, if a trial court has greater latitude in reaching a conclusion that the contract has been breached by the defendant than if the lawsuit has been pled as one for money damages?

**WISCONSIN SUPREME COURT**
**THURSDAY, JANUARY 10, 2013**
**9:45 a.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Walworth County Circuit Court decision, John R. Race, presiding.*

2010AP3158 Park Bank v. Westburg

This case examines the legal doctrines of direct/derivative claims and claim preclusion and the distinction between a debtor corporation and the persons who guarantee the repayment of a corporation's debts.

Some background: In 2004, Roger E. and Sandra L. Westburg selected a failed woodworking business in Walworth that they could purchase and use as the location for a new business. They formed two limited liability entities: Zaddo, Inc. (Zaddo), a corporation, to be the operating company; and Zaddo Holdings, LLC (Zaddo Holdings), a limited liability company, to own the real estate on which the business would be located. The Westburgs were the sole shareholders and sole operating officers of Zaddo. They were also the sole members of Zaddo Holdings.

In connection with the startup and funding of the business, the Westburgs ultimately signed two documents, each entitled "Continuing Guaranty (Unlimited)." In one document the Westburgs guaranteed payment of debts owed by Zaddo to Park Bank (the Bank), and in the other they guaranteed payment of debts owed by Zaddo Holdings.

The Bank provided interim financing for the purchase of the woodworking equipment and real estate, and worked with the Westburgs in applying for a loan through the Small Business Administration (SBA). According to the Westburgs, shortly after Zaddo and Zaddo Holdings had executed notes in favor of the SBA for its loans, the Bank informed the Westburgs that they personally needed to invest more than $200,000 in additional capital.

The Bank apparently extended an additional loan to Zaddo and took as security a mortgage lien on the Westburgs' home. After the home was sold, the Bank required the Westburgs to place some funds into an account at the Bank. According to the Westburgs, those funds were later transferred to a securities account at the Bank, which the Westburgs used for their living expenses. They assert that the Bank released any security interest in the personal funds in that account.

At a meeting in March 2006, the Bank gave a letter to Zaddo and the Westburgs that the Bank describes as a notice of default. The Westburgs assert that the Bank never stated that either entity was in default.

At another meeting in May 2006, the Westburgs signed some previously agreed-upon documents that subordinated their personal loans to Zaddo and Zaddo Holdings to the loans provided by the Bank. The Westburgs claim that the Bank representatives also produced an incomplete draft of a letter, dated for six days later and containing blanks. The Westburgs claim that out of fear that the Bank would take some action that would place their more than $1 million personal investment at risk, they signed the document, which the Bank has characterized as a forbearance agreement.

The Westburgs contend the Bank put a hold on the securities account and that they were pressured to initiate a Ch. 128 receivership proceeding in Walworth County Circuit Court on

behalf of Zaddo to regain access. The filing resulted in the liquidation of all of Zaddo's assets and the payment of nearly all of the proceeds to the Bank.

The Bank filed a separate foreclosure proceeding against Zaddo Holdings in Walworth County Circuit Court. The Bank's complaint did not name the Westburgs as defendants individually. Zaddo Holdings did not contest the lawsuit, and a default judgment of foreclosure in favor of the Bank was entered. The real estate owned by Zaddo Holdings was sold at a sheriff's sale, which was ultimately confirmed by the circuit court.

In January 2007, the Bank filed suit in Milwaukee County Circuit Court against the Westburgs personally on the guarantees of the loans to both Zaddo and Zaddo Holdings. The Bank's complaint sought slightly more than $680,000 for outstanding amounts owed by Zaddo and nearly $700,000 for outstanding amounts allegedly owed by Zaddo Holdings. Venue in the case was transferred to the Walworth County Circuit Court.

The Westburgs raised a substantial number of affirmative defenses and counterclaims against the Bank, including breach of fiduciary duty, breach of contract, and breach of the implied duty of good faith and fair dealing. They also included requests for a declaratory judgment, for punitive damages, and for injunctive relief against the bank.

The circuit court ultimately granted judgment in favor of the bank. On appeal, the Court of Appeals viewed the matter as a contract dispute and stated that there were two issues to be decided on review: (1) whether the Westburgs lacked standing to assert their claims and affirmative defenses because they belong to the corporate entities and are therefore derivative, and (2) whether the Westburgs' claims and affirmative defenses are barred by claim preclusion (i.e., should have been raised in the receivership and foreclosure actions).

The Westburgs ask the Supreme Court to review in greater detail the law, legal distinctions and financial relationships among limited liability entities, their shareholders or members, lenders and personal guarantors under the circumstances presented here.

**WISCONSIN SUPREME COURT**
**THURSDAY, JANUARY 10, 2013**
**10:45 a.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Kenosha County Circuit Court decision, William W. Warren III, presiding.*

2011AP685-CR State v. Travis

This criminal case examines whether a court's mistaken belief that a conviction required a minimum sentence of five years of confinement qualifies as a structural error requiring either resentencing or automatic reversal of the entire conviction, or as a non-structural error that can be disregarded if proven harmless.

Some background: The state alleged that Lamont L. Travis, while drunk, moved his hand down the abdomen toward the pubic area of a girl under the age of 12 years, but he was prevented from touching her pubic area because she slapped his hand away.

The complaint charged that Travis had committed attempted first-degree sexual assault of a child, in violation of Wis. Stat. § 948.02(1)(d), which prohibits an adult from having "sexual contact with a person who has not attained the age of 16 years by use or threat of force or violence." The factual allegations of the complaint did not mention the threat or use of force or violence.

Travis pled guilty. Although there also was no reference to force or violence during the plea hearing, the court's written judgment listed the same offense of conviction cited in the criminal complaint.

The court referenced the five-year mandatory minimum under Stat. § 948.02(1)(d) multiple times at the sentencing hearing, but did not explicitly mention the mandatory minimum when it announced the sentence of eight years of initial confinement and 10 years of extended supervision.

Travis filed a post-conviction motion, alleging that the circuit court had violated his due process rights by relying on inaccurate information (the mandatory five-year prison sentence) at sentencing and requested that he be granted a new sentencing hearing.

The circuit court agreed with Travis that the error in believing that Travis was subject to a minimum five-year prison sentence had "ultimately really pervaded the entire file in this case." It nonetheless denied Travis's motion because it found the error to have been harmless since it had relied "primarily" on Travis's prior criminal record. Although both parties and the court now agreed that Travis should not have been convicted under Wis. Stat. § 948.02(1)(d) because no force or violence was involved, the judgment of conviction was not amended.

The Court of Appeals remanded the case to the circuit court for resentencing only and ordered the circuit court to amend the judgment of conviction to show that Travis had actually pled guilty and been convicted under Wis. Stat. § 948.02(1)(e), which criminalizes "sexual contact with a person who has not attained the age of 13 years." Unlike subsection (1)(d), subsection (1)(e) does not require a five-year mandatory minimum sentence.

The Court of Appeals said in order for a complaint to be constitutionally valid, it "must contain the 'essential facts' constituting the offense charged." State v. Williams, 47 Wis. 2d 242, 253, 177 N.W.2d 611 (1970). Since the complaint had not alleged any fact supporting the threat

or use of violence or force, the complaint's allegation that Travis had violated subsection (1)(d) was constitutionally invalid.

In appealing to the Supreme Court, the state contends that the Court of Appeals' published decision has "radically expanded" the structural error doctrine and conflicts with the Supreme Court's decision in State v. Tiepelman, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1. Tiepelman indicated that if a defendant proves that a sentencing judge relied on inaccurate information, harmless error review applies to the error.

Travis claims that the Court of Appeals' decision was narrowly tied to the unusual facts of this case, where all the parties and the court relied on an erroneous view of the applicable statute from the filing of the complaint through sentencing. He emphasizes that this was not a case where a trial court relies on an inaccurate piece of information only at the sentencing hearing.

**WISCONSIN SUPREME COURT**
**FRIDAY, JANUARY 11, 2013**
**9:45 a.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Patricia D. McMahon and Kevin E. Martens, presiding.*

2011AP450-CR State v. Burton

This case examines whether a defendant is entitled to withdraw a guilty plea if there is no evidence in the record that he was advised, either by trial counsel or by the circuit court, of his right to have a jury trial on the issue of mental disease or defect.

Some background: It is undisputed that in June of 2009 Julius C. Burton shot two police officers who were trying to stop him after they saw him commit an ordinance violation. Although the defendant claimed the officers had drawn their guns, security footage from a nearby building showed that the officers had not taken their weapons out of the holsters. One officer was shot in the shoulder, knee and face. The other officer sustained serious injuries, including the loss of an eye and a portion of his brain.

Burton was charged with two counts of attempted first-degree intentional homicide by use of a dangerous weapon.

It is also undisputed the defendant has a history of mental health issues. At his initial appearance, the circuit court ordered a competency evaluation. Burton did not object after one physician found him competent to proceed to trial, and he initially pled not guilty by reason of mental disease or defect (NGI). Subsequently, another physician appointed by the court found insufficient evidence to support a not guilty by mental disease or defect, and another physician retained by defense counsel concluded there was sufficient evidence to support such a plea.

In January of 2010, the state offered to recommend 50 years of initial confinement and to stand silent on extended supervision if Burton would plead guilty to both counts. Burton agreed. He completed a plea questionnaire and waiver of rights form. The circuit court engaged him in a colloquy, discussed the fact that he would no longer be pursuing an NGI plea, accepted the pleas, and found him guilty. At sentencing, the circuit court imposed consecutive terms of 40 years of initial confinement and 10 years of extended supervision.

In January of 2011, the defendant filed a post-conviction motion seeking to withdraw his pleas. He alleged ineffective assistance of trial counsel and a circuit court failure during the plea colloquy. Both arguments were premised on the fact that neither trial counsel nor the circuit court advised the defendant at the plea hearing that he had the right to a bifurcated jury trial and that he could choose to plead guilty to the two offenses and still have a jury decide whether or not he was responsible by reason of mental disease or defect. Burton argued his pleas were not entered knowingly, voluntarily and intelligently.

The circuit court denied the post-conviction motion without a hearing. The defendant appealed, and the Court of Appeals affirmed. The Court of Appeals noted a hearing on a post-conviction motion is required only when the movant states sufficient material facts that, if true, would entitle him to relief.

The Court of Appeals noted that an NGI plea is authorized by § 971.06(1)(d), and that § 971.165 generally provides for the bifurcation of guilt and mental responsibility phases.

The Court of Appeals said although the motion alleged that the record failed to show whether trial counsel advised the defendant about a bifurcated plea, the motion did not allege that counsel actually failed to so inform him.

The court also noted a defendant who alleges counsel was ineffective in failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding. State v. Byrge, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999).

The Court of Appeals said the circuit court also had no obligation to personally address the defendant with respect to the withdrawal of his NGI plea. Having concluded the circuit court was not obligated to advise the defendant of the availability of bifurcation, the Court of Appeals said the post-conviction court properly denied relief.

While the Court of Appeals said courts must engage in personal colloquies to protect defendants against violations of fundamental constitutional rights, neither the federal constitution nor the Wisconsin Constitution confers a right to an insanity defense or plea. See State v. Francis, 2005 WI App 161, ¶1, 285 Wis. 2d 451, 701 N.W.2d 632.

The defendant argues that by failing to advise him of his right to a jury trial in regard to his NGI defense, even if he pled guilty to the crimes, the circuit court failed to obtain a knowing, intelligent and voluntary waiver of his right to a jury trial on that issue.

The defendant says the state of Wisconsin has conferred on criminal defendants the right to have a jury trial on the issue of whether they were not criminally responsible by reason of mental disease or defect, even if they pled guilty to the crimes charged against them.

A decision by the Supreme Court could clarify whether a circuit court is required to advise a defendant that he is entitled to plead guilty to the crimes and still have a jury trial to determine whether he should be held criminally responsible for those crimes by reason of mental disease or defect.

**WISCONSIN SUPREME COURT**
**FRIDAY, JANUARY 11, 2013**
**10:45 a.m.**

*This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed a Chippewa County Circuit Court decision, James M. Isaacson, presiding.*

2011AP203 Xcel Energy Services v. LIRC

This insurance case examines the interpretation of "adverse party" under Wis. Stat. § 102.23(1) and whether a Court of Appeals' decision affirmed by the Supreme Court on grounds other than those relied on by the Court of Appeals remains precedent that must be followed by the Court of Appeals.

Some background: John Smoczyk was injured on the job while working for Xcel Energy Services in January 2007 and applied for worker's compensation benefits. He was awarded temporary disability, but the administrative law judge deferred a decision regarding permanent total disability and loss of earning capacity until Smoczyk received additional diagnostic tests. Smoczyk did not appeal from this decision.

Smoczyk renewed his claim for permanent total disability on Aug. 11, 2009. The administrative law judge assigned to Smoczyk's renewed claim concluded Smoczyk had sustained a permanent partial disability of 60 percent and awarded monetary damages. On appeal, the Labor and Industry Review Commission (LIRC or the Commission) deemed Smoczyk permanently and totally disabled.

Xcel filed an action for circuit court review of the Commission's decision, naming the Commission and Smoczyk as respondents. Xcel's worker's compensation insurer, Ace American Insurance Co., (Ace) was not named as a party in the circuit court action, though it had been joined throughout the administrative proceedings.

The Commission moved to dismiss on competency grounds. It maintained that the circuit court lacked competency to hear the action because Xcel had failed to include Ace as a party.

*Competency* refers to a court's ability to exercise the subject matter jurisdiction vested in it by the state constitution. See Village of Trempealeau v. Mikrut, 2004 WI 79, ¶¶8-9, 273 Wis. 2d 76, 681 N.W.2d 190. "[A] failure to comply with a statutory mandate pertaining to the exercise of subject matter jurisdiction may result in a loss of the circuit court's competency to adjudicate the particular case before the court." *Id.*, ¶9. A judgment rendered by a court lacking competency is invalid. *Id.*, ¶14.

In a final order dated Dec. 14, 2010, the circuit court denied the Commission's motion to dismiss, but confirmed the Commission's order on the merits.

Xcel appealed the circuit court's final order. The Court of Appeals did not reach the merits of Xcel's arguments. It concluded that Xcel's failure to name Ace had constituted a failure to comply with the requirement in Wis. Stat. § 02.23(1)(a) to join "adverse part[ies]," which had deprived the circuit court of competency to adjudicate Xcel's complaint. The Court of Appeals said that it was bound under Cook v. Cook, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997), to apply a broad legal interpretation of the term "adverse party" set forth in a prior Court of Appeals opinion, even though the Supreme Court used a much narrower analysis when it affirmed the earlier Court of Appeals' decision. The Court of Appeals therefore reversed the

circuit court's order and remanded the case to the circuit court with directions to dismiss Xcel's complaint.

Xcel's petition lists four issues to be reviewed, two of which address the procedural aspects of the case:

1. Whether the circuit court lacked competency due to counsel for Xcel and Ace failing to name Ace a party to the case?
2. Did the Court of Appeals properly grant itself authority to review the circuit court's denial of LIRC's motion to dismiss when LIRC did not file a notice of appeal or cross-appeal?

Two other issues raised in the petition relate more to the merits of Xcel's arguments against LIRC's award of benefits to Smoczyk and the interplay of decisions by the administrative law judges involved in the case.